

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

Estate of MILDRED R. HEINTZ,  
Deceased.

HENRY HEINTZ,  
Petitioner and Appellant,

v.

CHARLES E. HEINTZ,  
Respondent.

A122251

(Sonoma County  
Super. Ct. No. SPR-077045)

Henry Heintz (petitioner) appeals from an order denying his motion to vacate a judgment entered in favor of his brother Charles E. Heintz (respondent) on a petition challenging the validity of their mother's trust and will. The court entered the underlying judgment after petitioner failed to file an opposition to respondent's motion for summary judgment.

The court denied petitioner's motion to vacate the judgment because petitioner (1) failed to file and serve the motion within six months of entry of judgment, (2) did not accompany the motion with a proposed opposition to the motion for summary judgment, and (3) failed to show inadvertence or excusable neglect and diligence.

We find no abuse of discretion, and affirm the order denying the motion to vacate the judgment.

**I. FACTS**

In June 2005, petitioner hired an attorney and filed a petition challenging his mother's trust on the ground that his brother, respondent, had exerted undue influence.

On December 27, 2006, respondent filed a motion for summary judgment. The court granted a continuance to allow petitioner's counsel to withdraw, and on February 9, 2007, petitioner's counsel filed a notice substituting petitioner in propria persona.

On February 23, 2007, at petitioner's request, the court granted another 60-day continuance to allow petitioner to obtain new counsel. In March, petitioner retained an attorney who appeared pursuant to a "Notice of Limited Scope Representation." The notice stated the attorney was appearing only for the purpose of taking a deposition, and the pleadings should continue to be served upon petitioner. On April 23, 2007, petitioner substituted himself in propria persona.

As of May 22, 2007, the day set for hearing the summary judgment motion, petitioner had not retained counsel, nor had he filed any opposition to the motion. He appeared at the hearing and requested another extension of time so that his brother Nicholas Heintz could join the case as a co-petitioner. The court noted that all of the siblings had been on notice of the proceedings "for a very long time." It denied petitioner's request for a continuance, and granted the motion for summary judgment. On June 8, 2007, the court entered judgment in favor of respondent.

Petitioner filed a notice of appeal on August 6, 2007, and the appeal was dismissed on October 31, 2007.

On December 6, 2007, petitioner's newly retained counsel filed a motion to vacate the judgment pursuant to Code of Civil Procedure<sup>1</sup> section 473, subdivision (b) (hereafter section 473(b)). The motion to vacate was based upon petitioner's alleged inadvertence and excusable neglect. In support of the motion he filed a declaration stating that after his first attorney withdrew, he reluctantly substituted himself in propria persona, but had no intention of representing himself. He obtained a 60-day continuance of the motion for summary judgment, and then retained Lawrence Bernheim to represent him "with respect to the upcoming motion for summary judgment only." Petitioner declared he became

---

<sup>1</sup> All subsequent statutory references are to the Code of Civil Procedure unless otherwise indicated.

dissatisfied with Mr. Bernheim, and on April 23, 2007 again substituted himself in propria persona. Between April 23, 2007 and the scheduled hearing date for the motion for summary judgment, which was May 22, 2007, petitioner contacted nine different attorneys or law firms. He found no one who was willing or able to handle the summary judgment motion. He did not file an opposition himself because he lacked the necessary expertise. Petitioner declared he appeared at the hearing and explained to the court that he had been unable to retain counsel and requested a further extension of time, but the court denied the request.

In opposition, respondent argued that the motion to vacate was untimely because petitioner did not serve it within six months of entry of the judgment. Respondent also argued the court must deny the motion because petitioner failed to accompany the motion with a proposed opposition to the motion for summary judgment. Finally, respondent argued petitioner failed to demonstrate excusable neglect or inadvertence, nor did he demonstrate diligence.

Respondent submitted a copy of Mr. Bernheim's notice of representation, which stated Mr. Bernheim appeared solely for the purpose of taking a deposition, not, as petitioner had declared, to oppose the motion for summary judgment. Respondent also submitted a transcript of the hearing on the motion for summary judgment showing that petitioner did not inform the court he needed more time to retain counsel. Instead he stated only that Nicholas Heintz, his other brother, wished to join in the petition.

Petitioner did not appear at the March 11, 2008 hearing on his motion to vacate the judgment. The court denied the motion. The order states that "procedurally, the Motion is untimely and not accompanied by the pleading to be filed if relief were granted." The court also denied the motion on substantive grounds, i.e., that petitioner failed to show "good cause," and diligence.

## **II. ANALYSIS**

Petitioner contends his motion to vacate was timely because the six-month period for filing a section 473(b) motion was tolled during the period his appeal from the underlying judgment was pending. He also contends the court erred by denying his

motion for failure to include a proposed pleading, and that this defect was not fatal because his motion also raised equitable grounds for relief. Petitioner further contends he demonstrated excusable neglect and inadvertence based upon his inability to retain counsel in time to respond to the motion for summary judgment.

We need not reach petitioner's novel contention that the six-month period for filing a motion to vacate is tolled during the pendency of an appeal of the underlying judgment, because we shall affirm the order denying the motion to vacate on the following grounds:<sup>2</sup> (1) petitioner failed to comply with the mandatory requirement that his motion be accompanied by the proposed pleading, and (2) the court was within its discretion to deny the motion based upon its conclusion that he failed to show inadvertence or excusable neglect and diligence.

***A. Failure to Submit a Proposed Pleading***

Section 473(b) provides that a motion for relief from a judgment taken against a party based upon mistake, inadvertence, surprise, or excusable neglect “*shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted.*” (Italics added.) The purpose of the “accompanied by” requirement, is to screen out applications for relief that do not assert a

---

<sup>2</sup> We also will not reach petitioner's argument that the court should have granted his motion to vacate the judgment based upon the interest his other brother, who was not a party to the action, had expressed in belatedly joining the petition. This contention is waived because he did not raise it in his motion to vacate below. (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117.)

In support of the foregoing contention petitioner requests that we judicially notice a document titled “Notice of Entrance of Co-Petitioner and Motion for Continuance,” filed by his brother Nicholas Heintz. In support of his contention that his motion was timely, petitioner also requests that we take judicial notice of the docket of his prior appeal of the underlying judgment.

We grant the request, but note that neither document affects our analysis because (1) petitioner waived his contention that the motion to vacate should have been granted based upon Nicholas Heintz's interest in joining the petition; and (2) even if the motion were timely, we affirm the court's order on the alternative stated grounds that he failed to show good cause and diligence.

potentially meritorious defense, or are made only for the purpose of delay. (*County of Stanislaus v. Johnson* (1996) 43 Cal.App.4th 832, 837.)

The “accompanied by” provision is mandatory, and some courts have held that the proposed pleading, like the motion to vacate itself, must be filed and served no more than six months from the entry of judgment. (See, e.g., *Puryear v. Stanley* (1985) 172 Cal.App.3d 291, 294–295.) Other courts have disagreed with *Puryear* as to precisely *when* the proposed responsive pleading must be filed, but agree that the “accompanied by” provision is mandatory. These courts have held the purpose of the “accompanied by” provision is satisfied if the proposed pleading is filed at any time before the hearing on the motion. (*County of Stanislaus v. Johnson, supra*, 43 Cal.App.4th at pp. 834–838; *Job v. Farrington* (1989) 209 Cal.App.3d 338, 340–341; accord, *Hu v. Fang* (2002) 104 Cal.App.4th 61, 65.)

Here, petitioner asserted that he initially failed to oppose the summary judgment because he was unable to retain counsel. Yet, despite having finally retained counsel, petitioner did not file a proposed responsive pleading with his motion to vacate the judgment. He sought to justify the omission by asserting that his attorney did not have time to prepare both a motion for relief from default *and* a proposed opposition to the motion for summary judgment. Yet petitioner had an additional *three months* between the filing of the motion to vacate and the scheduled hearing date to comply substantially with the “accompanied by” requirement and *still* failed to submit a proposed opposition even by the hearing date.

The only other explanation petitioner offered for the omission of a proposed pleading was that he did not have the financial resources to pay his attorney to prepare an opposition. He did not explain why his financial situation might improve if the court were to grant the motion to vacate. The court therefore had no reason to believe granting the motion would result in anything other than further delay while petitioner continued to seek more time to retain counsel and to find a way to pay for representation.

The reasons petitioner advances for why he should not have to accompany his motion with a proposed opposition to the motion for summary judgment serve only to

demonstrate why his noncompliance violated not only the letter, but also the spirit and purpose of this mandatory provision of section 473(b). In effect, petitioner urged the court to vacate a final judgment without providing any showing that he had a meritorious case, or any reason to believe that granting the motion would not simply result in further delay. (See *County of Stanislaus v. Johnson*, *supra*, 43 Cal.App.4th at p. 837 [purpose of the “accompanied by” requirement is to screen out applications for relief that do not assert a potentially meritorious defense or are made only for the purpose of delay]).

For the first time on appeal, petitioner asserts a new reason why his failure to submit a proposed pleading was not a fatal procedural defect. He asserts his motion to vacate also sought relief on equitable grounds based upon extrinsic mistake, or fraud, and that the requirement of section 473(b) that the motion be “accompanied by” a proposed pleading does not apply to a nonstatutory motion to vacate. (See, e.g., *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 982.)

We reviewed petitioner’s moving papers and have determined that he based his motion entirely on the statutory grounds set forth in section 473(b). In any event, construing his motion as a request for equitable relief would not produce a different outcome. A party seeking relief from a judgment on nonstatutory equitable grounds must, as one of the conditions for relief, “demonstrate that it has a meritorious case.” (*Stiles v. Wallis* (1983) 147 Cal.App.3d 1143, 1147.) Petitioner failed to do so. One of the ways to demonstrate a meritorious case is to submit a copy of the proposed pleading, which petitioner did not do. (*Id.* at p. 1148.) Even without time or financial resources to prepare a complete opposition, petitioner might at least have informed the trial court of the tentative grounds for his opposition by declaration of counsel and submission of relevant excerpts of deposition transcripts. Instead, he asked the court to set aside a final judgment based upon nothing more than the bare and unsupported assertion that with more time and money his counsel could prepare a meritorious opposition to the motion for summary judgment.

Petitioner also relies upon *Barnett v. Reynolds* (1932) 124 Cal.App. 750, 751–752, for the proposition that, if the motion to vacate is made upon equitable grounds, the

moving party need not demonstrate he or she has a meritorious case. *Barnett* is distinguishable because it concerned a motion to vacate a judgment that was *void* because it was entered without proper notice. The court held the moving party was entitled to relief without regard to the merits based upon the lack of notice. Therefore, the moving party did not need to submit a proposed pleading or make any other showing of a meritorious case. Here, there is neither an issue of lack of notice, nor any grounds for deeming the underlying judgment to be void.

We conclude section 473(b) required petitioner to submit a copy of his proposed opposition to the motion for summary judgment, and the court correctly denied the motion to vacate based upon petitioner's failure to comply with this mandatory procedural requirement. Even if the motion were generously construed as a nonstatutory motion to vacate, petitioner failed to demonstrate that he had a meritorious case, a necessary condition for equitable relief.

***B. Failure to Show Inadvertence or Excusable Neglect and Diligence***

The court also was well within its discretion to deny the motion on the merits because petitioner failed to demonstrate inadvertence or excusable neglect, and diligence. (See *In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th at p. 118 [an order denying a motion to vacate may be set aside only upon a showing of an abuse of discretion].)

“The only occasion for the application of section 473 is where a party is unexpectedly placed in a situation to his injury without fault or negligence of his own and against which ordinary prudence could not have guarded. Neither inadvertence nor neglect will warrant judicial relief unless it may reasonably be classified as of the excusable variety upon a sufficient showing.” (*Elms v. Elms* (1946) 72 Cal.App.2d 508, 513.)

Petitioner attempted to portray himself as having been suddenly and unexpectedly forced to represent himself only a month before the hearing on the motion for summary judgment. He argued that despite diligent efforts, he was unable to retain new counsel in such a short period of time. Yet, his declaration that he believed Mr. Bernheim was

going to represent him on the summary judgment motion is refuted by the plain terms of the “Notice of Limited Scope Representation” stating that Mr. Bernheim represented petitioner only for the purpose of taking a deposition. When his original counsel withdrew in February 2007, petitioner knew a motion for summary judgment was pending, and clearly understood that an opposition was due because he obtained a 60-day continuance. Despite petitioner’s claim of diligence in seeking new counsel, his declaration did not describe any effort at all to retain new counsel to represent him on the summary judgment motion until April 23, 2007.

A reasonably prudent person in these circumstances could be expected either to seek new counsel more diligently, or to prepare a response himself as the deadline approached. “It is the duty of every party desiring to resist an action or to participate in a judicial proceeding to take timely and adequate steps to retain counsel or to act in his own person to avoid an undesirable judgment. Unless in arranging for his defense he shows that he has exercised such reasonable diligence as a man of ordinary prudence usually bestows upon important business his motion for relief under section 473 will be denied. [Citation.] Courts neither act as guardians for incompetent parties nor for those who are grossly careless of their own affairs. All must be governed by the rules in force, universally applied according to the showing made.” (*Elms v. Elms, supra*, 72 Cal.App.2d at p. 513.)

Petitioner’s status as a pro. per. litigant did not excuse his neglect in failing diligently to seek new counsel, and failing to file an opposition to the motion for summary judgment. It is well established that “mere self-representation is not a ground for exceptionally lenient treatment. Except when a particular rule provides otherwise, the rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation. [Citation.] . . . A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation.” (*Rappleyea v. Campbell, supra*, 8 Cal.4th at pp. 984 –985.)



Petitioner also failed to show diligence in moving to vacate the judgment. He waited until just a few days before the six-month period expired to file the motion, and did not serve it until after the six-month period expired. Even if we assume *arguendo*, that the six-month period was tolled, it was also petitioner’s burden to demonstrate that he diligently sought relief within a *reasonable* time. “The proper procedure involves the presentation of some explanation by affidavit or testimony of any extended delay, and the court then determines whether such explanation may be sufficient to justify the granting of the relief sought.” (*Dew v. Pavese* (1967) 256 Cal.App.2d 484, 487.) Petitioner was present at the hearing on the motion for summary judgment, and knew judgment had been entered in respondent’s favor. Yet he did not offer any explanation at all to the trial court as to why he could not have filed a motion to vacate earlier. The court therefore was well within its discretion to find petitioner did not show diligence.

### III. CONCLUSION

The judgment is affirmed.

---

Margulies, J.

We concur:

---

Marchiano, P.J.

---

Graham, J.\*

---

\* Retired judge of the Marin County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.